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OCTOBER TERM, 1956

No. 864

JOHN T. MENZIES, PRESIDENT, CROSSE & BLACKWELL COMPANY; CHARLES P. McCORMICK, PRESIDENT, McCORMICK & COMPANY, INC.; AND SAMUEL H. HOFFBERGER, PRESIDENT, POMPEIAN OIL CORPORATION, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent.*

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John T. Menzies, President of Crosse & Blackwell Company; Charles P. McCormick, President, McCormick & Company, Inc.; and Samuel H. Hoffberger, President, Pompeian Olive Oil Corporation, pray that a writ of certiorari issue to review the judgment entered in this case on March 7th, 1957 by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is unreported.[1] The opinion of the United States District Court for the District of Maryland is reported in 145 F. Supp. 164.[2] The opinion of the Federal Trade Commission dated March 15, 1956, is reported in Federal Trade Commission Docket No. 6470.[3]

[1] Appended to this Petition is copy of opinion.
[2] See Printed Appendix, p. 27.
[3] See Printed Appendix, p. 12.

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Circuit Court of Appeals for the Fourth Circuit on March 7th, 1957. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U. S. C. 1254(1).

QUESTION PRESENTED

The issue in this case expressed in general terms is: Does the Federal Trade Commission have the power under the Federal Trade Commission Act to require a respondent corporation to produce its records in an administrative proceeding — not for any alleged violation of the Federal Trade Commission Act, and not brought under the Federal Trade Commission Act — but for an alleged violation of the Clayton Act as amended by the Robinson-Patman Act, and brought under the Clayton Act as amended by the Robinson-Patman Act?

The determination of this issue depends upon the Court's ruling on a narrow legal issue. This narrow legal issue grows out of the following facts: It is an uncontradicted fact in this case that the Clayton Act does not contain an express grant of subpoena power to the Federal Trade Commission. The Hearing Examiner, the Federal Trade Commission, the District Court of the United States for the District of Maryland, and the United States Court of Appeals for the Fourth Circuit, all held that the Clayton Act contained no such express grant of power. In order to hold that the Federal Trade Commission had the power to issue subpoenas in Clayton Act cases, it was necessary to find this power in some other Act, and then transfer this power from the other Act to the Clayton Act. Each Court and agency which passed on this question found this power in

the Federal Trade Commission Act, a separate and distinct Act from the Clayton Act. Under the guise of *"pari materia"*, each Court and Agency which passed on this question transferred this power granted the Commission in the Federal Trade Commission Act, to the Commission in proceedings under the Clayton Act. Each Court and Agency which considered this matter first made a transfer of power from the Federal Trade Commission Act, to the Clayton Act, and then added this transferred power to the Clayton Act. Thus the narrow legal issue in this case is whether such a transfer of power under the guise of "pari materia" is reversible error. This issue might be expressed as follows:

> Can a Court, under the guise of statutory construction, legislate a grant of power to an administrative agency when the Act defining the activity and powers of the Agency contains no such grant of power. Specifically under the doctrine of "pari materia", can the Court grant to the Federal Trade Commission a power which it has under the Federal Trade Commission Act but which it does not have under the Clayton Act as Amended by the Robinson-Patman Act? Furthermore — can a Court make this transfer of power from the Federal Trade Commission Act to the Clayton Act when the Federal Trade Commission Act by its expressed terms limits this power to the Federal Trade Commission Act?

STATUTES INVOLVED

1. *The Federal Trade Commission Act* — enacted September 26, 1914 (38 Stat. 171; 15 U. S. C. 41). It empowered the Commission to hold hearings and subpoena books and records, etc. of a corporation charged with a violation of the Act, as set forth in Sections 5 and 9 of the Act.

2. *The Clayton Act* — enacted October 15, 1914 (38 Stat. 730; 15 U. S. C. 12). It empowered the Commission to hold hearings as set forth in Section 11 of the Act. It did not contain a grant of subpoena power to the Commission.

3. *Robinson-Patman Act* — enacted June 19, 1936 (49 Stat. 1526; 15 U. S. C. Sections 13-14-18-19). It amended the Clayton Act. It did not change or modify the power of the Federal Trade Commission under the Federal Trade Commission Act or under the Clayton Act.

STATEMENT OF THE CASE

In November, 1955 the Federal Trade Commission instituted three separate proceedings under Section 11 of the Clayton Act, U. S. C. Title 15, Sec. 21, against Crosse & Blackwell Company, McCormick & Company, Inc., and Pompeian Olive Oil Corporation, charging each corporation with a violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, U. S. C. Title 15, Sec. 13 (5).* Each Corporation filed an answer denying that it had violated the Clayton Act as alleged, and interposed certain affirmative defenses (19).

Before the answers were filed, a subpoena was issued in each case and served upon the President of each Corporation, directing him to appear before the Hearing Examiner, to testify at the instance of the Commission, and to bring with him and produce certain corporate books, records, accounts, invoices, and other documents.

The President of each Corporation (being the Petitioners in this Petition for Writ of Certiorari) filed a motion to quash the issuance of the subpoena, alleging that the Federal Trade Commission had no subpoena power under the

* Figures in (....) refer to Printed Appendix.

Clayton Act to compel the production of corporate documents, books and records, etc. The Examiner denied the motion; the Petitioners applied to the Federal Trade Commission and the Federal Trade Commission denied the motion.

Thereafter in March, 1956, after the return of the subpoenas, hearings were convened in each case at Baltimore, Maryland. Officials of each Corporation, in charge of the corporate records described in the subpoenas, appeared as the representative of each Corporation and its President (16). Upon the advice of counsel, each official respectfully declined to produce the records demanded by the subpoenas; but did not refuse to testify (20). The Commission's Attorney advised the Examiner in each case that he could not proceed without these records. The Examiner adjourned the hearings.

On March 29th, 1956 the Commission filed in the District Court of the United States for the District of Maryland in each case an application for an order under Section 9 of the Federal Trade Commission Act (U. S. C. Title 15, Sec. 49), requiring the Petitioners to appear before a Hearing Examiner, and to produce the records described in the subpoenas, or to show cause why they should not be produced (14). The Petitioners filed an answer denying that the Federal Trade Commission had the power under the Clayton Act to compel the production of corporate books, and records.

The matter came on for a hearing before the District Court of the United States for the District of Maryland at Baltimore, which Court, on September 11, 1956, filed an Opinion, and entered an Order, granting the application of the Commission and requiring the giving of testimony and the production of the documentary records described in the subpoenas (27). On appeal to the Circuit Court of

Appeals for the Fourth Circuit, the decision of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT

The petition should be granted in this case because—

1. A Federal question of the utmost importance is the sole issue in this case. This question has never been decided by the Supreme Court of the United States. This question is inherent in practically every administrative proceeding of the Federal Trade Commission in the enforcement of the Clayton Act as amended by the Robinson-Patman Act wherein the sole issue is an alleged violation of this Act. The issue must be definitively and finally determined to prevent chaos in Robinson-Patman proceedings before the Commission, and to provide an orderly procedure in such cases.

2. The determination of this question is as important to the Government as it is to parties charged by the Government with a violation of the Clayton Act as amended by the Robinson-Patman Act. Until it is finally and definitively determined, neither the Government, the Commission, nor the parties cited before the Commission for an alleged violation of the Clayton Act as amended by the Robinson-Patman Act, can know how to proceed with respect to the production of books and records in Clayton Act proceedings.

3. The issue must be determined — if not by the Supreme Court, then by Congress. Some time after this case was argued in the United States Court of Appeals for the Fourth Circuit, there was introduced Senate Bill 1023 in the Eighty-Fifth Congress, First Session. This Bill would determine, by an Act of

Congress, the exact issue in this case, by granting the power to the Commission, which the Commission exercised in this case. A copy of this Bill is attached to this petition.* This Bill emphasizes the extreme confusion surrounding this question. Such a situation requires clarification, and until finally clarified, can only result in continuous litigation and delay.

4. There is a direct conflict in the District Courts with reference to the question involved in this case. Compare *Federal Trade Commission v. Menzies,* 145 F. Supp. 164, with *Federal Trade Commission v. Rubin,* 145 F. Supp. 171.

There are at present two cases on appeal to Circuit Courts of Appeals involving this question, as evidenced by *Federal Trade Commission v. Rubin, et al.,* 145 F. Supp. 171, and *Federal Trade Commission v. Reed, et al.,* D. C. N. D. Ill. E. D. Docket 56c-843. Neither of these appeals as of this date have been decided. There is one appeal involving this general question before the Federal Trade Commission — *The Vendo Case,* F. T. C. Docket No. 6646.

5. The Federal Trade Commission has recently under Pre-Merger Notification Bill, H. R. 9424, undertaken an examination and investigation of proposed corporate mergers and their economic effects upon the economy of the Nation. The matter is under intensive study by the Commission. The power of the Commission to subpoena corporate books and records is a most essential question involved in this entire matter. Until this question is determined, there will be continuous litigation to determine the right and power of the Commission to investigate corporate mergers.

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* See Appendix B this Brief.

6. The question is one of great public importance, as evidenced by the number of cases now pending; Senate Bill 1023 and H. R. 9424 Congress, the inquiries received for briefs and records in this case; the requests from Law Schools such as the Harvard Law Review, the Fordham Law School and New York University Law School.

ARGUMENT

THE FEDERAL TRADE COMMISSION DOES NOT HAVE THE POWER UNDER THE FEDERAL TRADE COMMISSION ACT TO REQUIRE A RESPONDENT CORPORATION TO PRODUCE ITS RECORDS IN AN ADMINISTATIVE PROCEEDING INSTITUTED AGAINST SAID CORPORATION UNDER THE CLAYTON ACT, BECAUSE

NO SUCH POWER IS GRANTED TO THE COMMISSION IN THE CLAYTON ACT; AND

THE POWER OF SUBPOENA GRANTED TO THE COMMISSION IN THE FEDERAL TRADE COMMISSION ACT IS EXPRESSLY LIMITED TO THE PURPOSES OF THAT ACT.

The Clayton Act contains no Grant of Subpoena Power to the Federal Trade Commission.

An examination of the Clayton Act immediately discloses that this Act contains no express grant of subpoena power to the Federal Trade Commission. Section 11 of the Clayton Act (U. S. C. Title 15, Sec. 21) grants the Commission the power to hold hearings; defines the power of the Commission with respect to such hearings, but contains no grant of subpoena power. This is recognized by the Federal Trade Commission. In its Opinion, it stated:

> (12) "It is not controlling, however, that the Commission was not expressly empowered under the Clayton Act to issue subpoenas in inquiries and proceedings instituted under that Act."

The District Court of the United States for the District of Maryland found that the Federal Trade Commission in Clayton Act proceedings had the power to issue subpoenas *not because the Clayton Act gave the Commission this power, but because the Clayton Act and the Federal Trade Commission Act were, in the opinion of the Court, in pari materia.* This Court stated (29):

> "They (Clayton Act and Federal Trade Commission Act) are in *pari materia* and should be construed together."

The United States Court of Appeals for the Fourth Circuit merely approved the above holding of the District Court of the United States for the District of Maryland, also finding that the two Acts were in *pari materia.*

A Bill recently introduced in Congress specifically recognizes that the Clayton Act does not contain subpoena powers. There was recently introduced into Congress Senate Bill 1023. The purpose of this Bill was as set forth in the Bill itself:

> "To clarify the powers granted the Federal Trade Commission by Section 9 of the Federal Trade Commission Act to compel the production of documentary evidence."

By this Bill, Congress would grant to the Commission the power which the Commission never had, but attempted to exercise, in this case.

Thus it is clear that the Clayton Act contains no grant of subpoena power, and that this fact was not only recognized by the Courts and Agency which passed on this question, but also by pending legislation in The Congress of the United States. The subpoena power if it is to be given to the Commission in Clayton Act cases, must be found in some other Act. This power is in the Federal Trade Commission Act. Under the guise of Statutes *in pari materia,* this power was transferred from the Federal Trade Com-

mission Act to the Clayton Act, a remarkable act of legal prestidigitation.

It is obvious that this transfer of power from the Federal Trade Commission Act to the Clayton Act by an act of statutory construction is judicial legislation, unless the Federal Trade Commission Act authorizes such a transfer.

Is this grant of power in the Federal Trade Commission Act limited to the purposes of that Act or is it intended to apply to other Acts? What was the Congressional intent as set forth in the language of the Act, and how has this intent been manifested over the years? An examination of the Federal Trade Commission Act, as well as the Clayton Act itself, conclusively shows that the subpoena power in the Federal Trade Commission Act is limited to that Act and no other Act.

Introduction to Acts — The Clayton Act and the Federal Trade Commission Act are separate and distinct acts. Each Act contains its own sanctions. Each Act is a unified complete Act in itself.

The Federal Trade Commission Act — This Act is broad and regulatory. It empowers the Commission to gather and compile information concerning the organization, businesses, conducts, practices and the management of corporations engaged in commerce, subject to certain exceptions. The Commission is empowered to require such corporations to furnish information and file annual and special reports. Under certain circumstances, the Commission is authorized to investigate and report facts relating to any alleged violation of anti-trust laws; to investigate for the Attorney General, or on the Commission's own initiative, the manner in which anti-trust decrees against corporations are being carried out; and further upon application of the Attorney General to recommend readjustments of business corporations alleged to be in violation of the anti-trust acts.

The Commission is further empowered to investigate from time to time trade conditions in and with foreign countries where associations, combinations or practices of manufacturers or traders may affect the foreign trade of the United States, and to make reports thereon to Congress with its recommendations.

Under the Wheeler-Lea amendments, there is conferred on the Commission special authority for the control of false advertising of foods, drugs, cosmetics and curative or corrective devices.

The Commission is also empowered to administer and enforce the provisions of the following Acts:

Webb-Pomerene Export Act — U. S. C. Title 15, Sec. 61, etc.;
The Wool Products Labeling Act — U. S. C. Title 15, Sec. 68, etc.;
The Fur Products Labeling Act — U. S. C. Title 15, Sec. 69, etc.;
Flammable Fabrics Act — U. S. C. Title 15, Sec. 1191, etc.

In order that the Commission may fulfill these many executive, regulatory, legal and administrative duties, Congress granted to the Commission the right of subpoenas. Section 9 of the Federal Trade Commission Act, U. S. C. Title 15, Sec. 49, provides:

> "That for the purpose of this Act, the Commission . . . shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation".

The Clayton Act — This Act as amended by the Robinson-Putnam Act, is limited in its scope. The procedure for judicial review and enforcement of the Commission's cease-and-desist orders under this Act is entirely different from such procedure under the Federal Trade Commission Act.

The Clayton Act primarily contains specific prohibitions against defined discriminatory merchandising practices. To enforce and police its limited field, no power of subpoena was given to the Commission. It may be assumed that Congress believed no such power was necessary.

The Federal Trade Commission is purely a statutory body and possesses only such powers as are granted by the Statute. Since it admittedly was not granted the power to issue subpoenas, it follows that it does not have the power.

The Power of Subpoena granted to the Commission in the Federal Trade Commission Act is Expressly Limited to the Purpose of that Act.

Section 9 of the Federal Trade Commission Act (U. S. C. Title 15, Sec. 49) is the only authority under which the Commission may issue a subpoena. This grant of subpoena power was strictly limited by Congress in clear and unambiguous language to the Federal Trade Commission Act. Section 9 specifically limits this power to the purposes of this Act. It is limited to proceedings under the Act. Section 9 contains this specific limitation at the beginning of the Section:

> *"That for the purposes of this Act* the Commission . . . shall at all reasonable times have access to . . . any documentary evidence of any corporation being investigated or proceeded against and the Commission shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matters under investigation." (Emphasis supplied.)

This limitation is specifically set forth in other sections of the Act. The fourth paragraph of Section 9 provides:

> "Upon the application of the Attorney General of the United States . . . the District Courts of the United States shall have jurisdiction to issue writs of man-

damus compelling any person or corporation to comply *with the provisions of this Act or any order of the Commission made in pursuance thereof.*" (Emphasis supplied.)

The fifth paragraph of Section 9 provides:

"The Commission may order testimony to be taken by deposition in any proceeding or investigation pending *under this Act* at any stage of such proceedings or investigation". (Emphasis supplied.)

This limitation is recognized in the codification of the Federal Trade Commission Act in the United States Code. The United States Code, Title 15, Section 49, provides:

"For the purposes of Sections 41-46 and 47-58 of this Title, the Commission . . . shall have power to require by subpoena . . . the production of all such documentary evidence . . ." (Emphasis supplied.)

The words "For the purposes of this Act" in Section 9 of the Federal Trade Commission Act, and the words "For the purposes of Sections 41-46 and 47-58 of this Title" are clear and unambiguous; they limit the subpoena power of the Commission to the purposes of the Act. For an analogous case see:

Harriman v. Interstate Commerce Commission, 211 U. S. 407.

Commission's Interpretation — To accept the Commission's contention that the subpoena power of the Commission in Section 9 of the Federal Trade Commission Act, can be extended by the Commission to administrative proceedings under the Clayton Act, is to ignore and reject the express language of the Act itself. The Commission is forced to take the position: (a) that when The Congress said "For the purposes of this (Federal Trade Commission) Act", in Section 9 of the Federal Trade Commission Act, The Congress meant "for the purposes of this (Federal Trade Com-

mission) Act and the Clayton Act"; (b) that when The Congress codified the Federal Trade Commission Act in the United States Code as Sections 41-46 and 47-58 of Title 15 and expressly limited the subpoena power of the Commission in Section 9 by the words "For the purposes of sections 41-46 and 47-58 of this Title", that The Congress was mistaken and meant to say "For the purposes of sections 41-46 and 47-58 and of sections 13, 14, 18 and 19 (sections 2, 3, 7 and 8 of the Robinson-Patman Act) of this title".

Congressional Interpretation — If in fact Section 9 of the Federal Trade Commission Act embodied a general grant of the subpoena power to the Commission, despite the express limitation appearing at the very outset of the section, there would be no need for The Congress to make specific provisions for the grant of subpoena power when conferring additional enforcement responsibilities upon the Commission. However, such has been the consistent and regular practice of Congress where it desired and intended to extend the subpoena power of the Commission from purposes of the Federal Trade Commission Act to purposes of other Acts to be administered by the Commission.

Thus, in Section 5 of the Webb-Pomerene Export Trade Act of 1918, U. S. C. Title 15, Sec. 65, The Congress provided:

> "For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in the Federal Trade Commission Act."

Section 6(a) of the Wool Products Labeling Act of 1939, U. S. C. Title 15, Sec. 68d(a), explicitly provides:

> "Except as otherwise specifically provided herein, this Act (Sections 68-68j of this title) shall be enforced by the Federal Trade Commission under rules, regulations,

and procedure provided for in the Federal Trade Commission Act.

"The Commission is authorized and directed to prevent any person from violating the provisions of this Act (Sections 68-68j of this title) in the same manner, by the same means, and with the same jurisdiction, powers, and duties, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act. . . ."

The same incorporation of powers is made in Section 8(a) (1) and (2) of the Fur Products Labeling Act of 1951, U. S. C. Title 15, Sec. 69f(a) (1) and (2), and in Section 5(a) and (b) of the Flammable Fabrics Act, U. S. C. Title 15, Sec. 1194(a) and (b).

In addition to the above Statutes which clearly express the Congressional intent, this intent is emphatically set forth in Senate Bill 1023, introduced into the 86th Congress, First Session, on February 4, 1957 and referred to the Committee on Interstate and Foreign Commerce. This Bill, among other things, provides:

"9. For the purposes of this Act and for the purposes of any proceedings or investigations of the Commission under *Section 11* of the Act entitled 'An Act to supplement existing laws against unlawful restraint and monopoly' . . . the Commission . . . shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." (Emphasis supplied.)

Where the Language of a Statute is plain and unambiguous, there is no occasion for construction, and the Statute must be given Effect according to its plain and obvious meaning. It cannot be given some other meaning under the Doctrine of "pari materia".

The Federal Trade Commission asks this Court to read into the Clayton Act a power not given in the Act. In considering just this kind of an argument, Mr. Justice Frankfurter, in *Columbia Law Review*, May, 1947, Vol. 47, No. 4, page 533, stated:

> "A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making wisely suggest, construction must eschew interpolation and evisceration. *He must not read in by way of creation.*" (Emphasis supplied.)

At page 534 of the same Article, Mr. Justice Frankfurter quotes with approval from *Iselin v. U. S.*, 270 U. S. 245, at 250, 251:

> "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope."

It requires no citation of authority to establish the rule that where the language of a statute is plain and unambiguous, there is no occasion for construction. As stated by Mr. Chief Justice Vinson, in considering this problem in connection with Section 1404(a) of Revised Title 28 of the U. S. Code, Judiciary and Judicial Proceedings, in *"Ex-Parte Collett"*, 337 U. S. 55, 93 L. Ed. 1207 at 1211:

> "Third. Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of par. 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear."

In considering this same question in connection with the National Labor Relations Board, Mr. Justice Jackson, in the case of *Packard Motor Company v. National Lab. Rel. Bd.*, 330 U. S. 485, 91 L. Ed. 1040 at 1050, said:

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

See cases collected: 82 *C. J. S. Statutes*, par. 322, p. 577.

Since the Act is clear and unambiguous, it must be given its clear and unambiguous meaning.

The Doctrine of Pari Materia cannot give the Federal Trade Commission the Power to Issue a Subpoena which the Act itself does not give to the Commission.

The statutory limitations of the subpoena power of the Commission in Section 9 of Federal Trade Commission Act is explicit and clearly defined. The words "for the purpose of this Act" are clear and unambiguous. As set forth above, there is nothing which requires any construction.

Apart from any other considerations, the doctrine of *pari materia* can never be used to supply a specific provision omitted from an Act, or to restrict a limitation contained in another Act. As stated in 82 *C. J. S. Statutes*, par. 366, p. 814:

> "In other words, the rule of construction may not be applied to narrow the compass of one statute by reference to another non-conflicting and non-repealing act, and restrictions placed on a power in one instance cannot be extended to another case for which they were not intended and for which another provision was made."

Thus, in the present case, a power contained in the Federal Trade Commission Act cannot be added to the Clayton Act by a doctrine of statutory construction.

The doctrine of *pari materia* was never intended to usurp the power vested in Congress by giving Courts the power to construe powers or provisions in Acts, which Acts do not contain such powers or provisions. The power of legislation is vested in Congress, not Courts under the guise of *pari materia*.

In this instance, to do so is to give a statutory agency a power never conferred by Congress. It is to violate the doctrine that a statutory agency is a creature of Congress, and can only have the power granted by Congress. If the subpoena power is grafted into the Clayton Act, what other powers may be taken from the Federal Trade Commission Act and grafted into the Clayton Act? The Commission has made one attempt to read enforcement proceedings under the Federal Trade Commission Act into the Clayton Act. This attempt failed.

> *F. T. C. v. Rubberoid*, 343 U. S. 470, 96 L. Ed. 1081.

In both the Clayton Act and the Federal Trade Commission Act, there are specific provisions for the enforcement of each Act. There are sanctions contained in the Clayton Act which are not contained in the Federal Trade Commission Act. Each Act is a complete Act in itself. The doctrine of *pari materia* does not apply, and was never intended to apply, to the construction of an Act which is complete in itself.

> *F. T. C. v. Rubberoid Co.*, 343 U. S. 470, 96 L. Ed. 1081;
> *McComb v. McKay*, 164 F. (2d) 40;
> 82 *C. J. S. Statutes*, par. 366, page 814 — Note 4.

The statutes are different; each statute is complete in itself; the statutes are clear and require no construction, and the doctrine of *pari materia* cannot be used to supply something in one statute which is not found in the other. It is submitted the doctrine of *pari materia* has no application in this case.

Legislative History

If consideration is to be given the Congressional history surrounding the enactment of the Federal Trade Commission Act, it only serves to confirm the plain and unambiguous language of the statute, and the limitation placed by Section 9 of the Act on the subpoena power of the Federal Trade Commission.

The limitation contained in the words "For the purposes of this Act" was no legislative inadvertence. In the Congressional consideration of this very provision of the Act, there was a specific rejection of an attempt to grant broad and unlimited subpoena powers to the Federal Trade Commission. The Bill to create the Federal Trade Commission as reported out by the House Interstate and Foreign Commerce Committee on April 14, 1914, House Report No. 533, provided:

> "Sec. 16. *That for the purposes of this Act,* and in aid of its powers of investigation herein granted, the commission shall have and exercise the same powers conferred upon the Interstate Commerce Commission in the Acts to regulate commerce to subpoena and compel the attendance and testimony of witnesses . . ." (Emphasis supplied.)

The Senate substitute for this Bill, Senate Report No. 597, June 13, 1914, adopted August 5, 1914, eliminated the qualification "for the purposes of this Act" and provided:

"Sec. 8. The Commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpoena and compel the attendance and testimony of witnesses . . ."

The final version of Section 9 as it came out of Conference restored the initial limitation, restricting the subpoena power to the purposes of the Federal Trade Commission Act. House Conf. Report No. 1142, September 4, 1914. This action was taken at the very time that Congress was considering the Clayton Act.

Thus the statutory history of the Act confirms the express wording of the Act.

Section 11 of the Clayton Act Details how the Authority vested in the Commission shall be Exercised under the Clayton Act — it does not grant the Commission Power to Issue Subpoenas under the Clayton Act.

The Clayton Act, U. S. C. Title 15, Section 12, etc. was enacted in 1914 to supplement the existing anti-trust laws. In 1936 it was amended by the Robinson-Patman Act.

Section 11 of the Clayton Act, U. S. C. Title 15, Section 21, provides the administrative machinery for the enforcement of the Act. This section grants authority to enforce Compliance with the Act to

(1) the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Commission Act, as amended;

(2) the Federal Communications Commission where applicable to common carrier engaged in wire or radio communication or radio transmission of energy;

(3) the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938;

(4) the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and

(5) the Federal Trade Commission where applicable to all other character of commerce.

Section 11 sets out in meticulous detail how the authority vested in the above administrative agencies is "to be exercised". It provides the exact power and authority of the Commission in enforcement proceedings for alleged violations of Sections 2, 3, 7 and 8 of the Clayton Act, as amended by the Robinson-Patman Act. There is not one word in Section 11 or in any section of the Clayton Act authorizing the Federal Trade Commission, by subpoena or otherwise, to require a respondent corporation to produce its records in administrative proceedings against a corporation for an alleged violation of the Clayton Act. If it was intended that the Commission should have subpoena power in the Clayton Act, then this power would have been set forth in this carefully drafted Section, setting up the power of the Commission in the Clayton Act.

The deliberate omission of Congress to grant subpoena power to the Federal Trade Commission in administrative proceedings under Section 11 is strikingly exemplified when it is noted that in Sections 13 and 15 of the Clayton Act, U. S. C. Title 15, Sections 23 and 25, the use of subpoenas is expressly authorized in the enforcement of special sanctions in certain court proceedings. There is not even an implied grant of subpoena power in the Clayton Act in administrative proceedings.

Section 11 of the Clayton Act, in its last paragraph, provides the methods by which service of complaints, notices,

orders petitions, applications and other papers in an administrative proceeding under this section may be served upon parties charged with a violation of Sections 2, 3, 7 and 8. This paragraph provides:

> "Complaints, orders and other processes of the Commission or Board *under this section* may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary or other executive officer or a director of the Corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid, shall be proof of the service of same." (Emphasis supplied.)

It is clear that this paragraph does not confer the subpoena power upon the Federal Trade Commission, and has no reference whatsoever to the subpoena power, but merely describes the mechanics of serving the papers authorized by the preceding paragraphs of Section 11.

It is only the complaints, orders and other processes "under this section" which may be so served. Nowhere in Section 11 or in any other sections of the Clayton Act as amended by the Robinson-Patman Act is the subpoena power granted to the Commission. This section merely provides for service of process, it provides no grant of power.

The complete lack of substance in any claim that the subpoena power is to be found by inference in the words

"other processes" in the last paragraph of Section 11 is self evident when consideration is given to the fact that virtually the identical language is contained in subsection (f) of Section 5 of the Federal Trade Commission Act, U. S. C. Title 15, Sec. 45 (f).

Subsection (f) of Section 5 of the Federal Trade Commission Act provides:

> "Complaints, orders and *other processes* of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or principal office or place of business of such person, partnership, or corporation; to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same." (Emphasis supplied.)

This subsection clearly relates to the method of service of the complaints, notices, orders, petitions, applications and other papers referred to in Section 5 of the Federal Trade Commission Act in an administrative proceeding under Section 5 of said Act. The subsection has no reference whatsoever to the subpoena power. It is obvious that it does not grant the subpoena power to the Federal Trade Commission in administrative proceedings under the Federal Trade Commission Act any more than the last paragraph of Section 11 does in administrative proceeding under the Clayton Act.

Section 9 of the Federal Trade Commission Act specifically granted the Commission the subpoena power under that Act. If subsection 5 (f), by the use of the words "other processes" in this same Act grants the Commission the power to issue a subpoena, then the carefully granted power contained in Section 9 is utterly meaningless.

The lack of any grant of subpoena power to the Federal Reserve Board, which is one of the five (5) administrative agencies named in Section 11, was specifically commented upon at page 422 of the Final Report of the Attorney General's Committee on Administrative Procedure (1941). See also *Transamerica Corporation v. Board of Governors of the Federal Reserve System,* 3rd Cir. 1953, 206 F. 2d 163 at 170, cert. den. 346 U. S. 901 (1954).

As stated in the Final Report of the Attorney General's Committee on Administrative Procedure at pages 414-5 "not all administrative agencies have been given all of these (visitorial and subpoena) powers; *indeed, some agencies have been given none at all*". (Emphasis supplied.)

In addition to the Federal Reserve Board (see part 9, Monograph of Attorney General's Committee on Administrative Procedure), there are a number of administrative agencies which are authorized by Congress to conduct administrative proceedings, but do not have the subpoena power, although such proceedings include complaints hearings, and adjudications, that are similar to the administrative proceedings conducted by the Federal Trade Commission under Section 11 of the Clayton Act. Among these are the Post Office Department which conducts administrative fraud order proceedings that include complaints, hearings, and adjudications that may deprive persons, partnerships, and corporations of the use of the mails, and the Civil Service Commission which conducts administrative

proceedings that adjudicate the rights of Government employees.

In *Deviny, etc. v. Campbell*, D. C. Cir. 1952, 194 F. 2d 876, cert. den. 344 U. S. 829 (1952), which involved an administrative proceeding by the Civil Service Commission adjudicating the rights of a Government employee, the Court of Appeals for the District of Columbia held that the Civil Service Commission does not have the subpoena power and that it has no power to issue subpoenas where such power is not conferred by a statute.

In the companion case of *Federal Trade Commission v. William B. Rubin, President, The Sweets Company of America, Inc.* and The Sweets Company of America, Inc., a corporation, No. M 18-304, decided August 17, 1956, by the United States District Court for the Southern District of New York, 145 F. Supp. 171 and involving the same legal question, District Judge Dimock in part stated:

> "It will be noted that both section 5 of the Federal Trade Commission Act and section 11 of the Clayton Act refer to the service of '(c) complaints, orders, and other processes . . . under this section'. In each statute 'this section' refers to a section prescribing the procedure for the institution and prosecution of complaints. Neither section refers to the subpoena power and, indeed, the subpoena power is not conferred or referred to at all by the Federal Trade Commission Act until the later section 9. In each statute 'this section' dealt with a notice in addition to a complaint and order. The provision for service might well have described the papers as 'complaints, orders or notices . . . under this section' but the more generic term 'processes' was used out of an abundance of caution. Since the section had nothing to do with subpoenas and the word 'processes' serves a function without treating it as referring to subpoenas, I cannot bring myself to say that they are included in the expression 'processes . . .

under this section'. I hold, therefore, that the Clayton Act did not confer the subpoena power on the commissions and board which it authorized to enforce the Act. I reach this conclusion with great reluctance. I cannot help feeling that the omission of the subpoena power section from the Clayton Act was a mere inadvertence, and, were I able to find any internal evidence to support that feeling, I would treat that evidence as an implication of the power. A decent respect for the separation of the spheres of the judiciary and the legislative prohibits me, however, from presuming that something that I would have included in a statute was inadvertently omitted by Congress and then supplying the omitted matter."

* * * * * *

". . . It is hard to conceive of a congressional policy which would withhold the subpoena power from the Federal Reserve Board where the Act was being enforced against banks but bestow it upon the Federal Trade Commission where the Act was being enforced against other non-carrier corporations. Yet that would be the result of holding that the subpoena power in Clayton Act cases was conferred on the Federal Trade Commission by the Federal Trade Commission Act. No statute has ever conferred the subpoena power on the Federal Reserve Board. Thus the Federal Trade Commission could use subpoenas in Clayton Act cases but the Federal Reserve Board could not.

"In arguing that the Federal Trade Commission's subpoena power granted by the Federal Trade Commission Act may be used by it in the enforcement of the Clayton Act, petitioner uses as a makeweight the word 'processes' which I have just discussed. It is claimed that this word includes 'subpoenas' and thus indicates that Congress contemplated that the commissions and board which would enforce the Clayton Act would use in doing so such subpoena power as was granted them by other acts. As just indicated, I cannot bring myself to believe that the word 'processes'

as used in the Clayton Act includes subpoenas so I cannot allow it influence, even as a makeweight, in supporting petitioner's contention that the Federal Trade Commission Act empowers the Federal Trade Commission to use subpoenas in the enforcement of the Clayton Act."

It should be noted that the District Court for the Southern District of New York and the District of Maryland, in deciding the same identical issue, arrived at exactly opposite conclusions.

Section 6(c) of the Administrative Procedure Act does not Supply the Lack of Power since Section 6(c) is Limited to Agencies that are authorized by law to issue Subpoenas, and the Commission has no Power to Issue a Subpoena under the Clayton Act.

The Administrative Procedure Act does not expand the subpoena power of the Federal Trade Commission beyond that conferred by Section 9 of the Federal Trade Commission Act. The Administrative Procedure Act provides:

Section 6 (c), U. S. C., Title 5, Sec. 1005 (c) provides:

"Agency subpoenas authorized by law shall be issued to any party upon request . . ."

Section 7 (c) U. S. C., Title 5, Sec. 1006 (b) provides:

"Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to . . . issue subpoenas *authorized by law* . . ." (Emphasis supplied.)

The above sections were to assure private parties the same access to subpoenas as that available to the representatives of the agencies and do not expand the powers of administrative agencies. S. Rep. No. 752, 79th Cong. 1st Sess. and H. Rep. No. 1980, 79th Cong. 2nd Sess. The Ad-

ministrative Procedure Act imposes a limitation and does not contain any sanction for the issuance of subpoenas, unless they are elsewhere authorized by statute.

The Federal Trade Commission is an Administrative Agency and has no common law or inherent power to Issue Subpoenas.

The Federal Trade Commission is an administrative agency and has no common law, or inherent power, to issue a subpoena. It is a creature of Congress and possesses only those powers granted by Congress. As stated by Mr. Justice Reynolds, speaking for the court, in *F. T. C. v. Sinclair Refining Company, et al.*, 261 U. S. 463 at 465:

> "The powers of the Commission are limited by the Statute."

This same doctrine is repeated almost verbatim in *Arrow-Hart and Hegeman Electric Company v. F. T. C.*, 291 U. S. 587 at 598, wherein Mr. Justice Roberts, speaking for the Court said:

> "The Commission is an administrative body possessing only such powers as are granted by the Statute."

This proposition, as such, is not subject to dispute, the Court's attention is directed to only a few further authorities:

Humphrey's Executor v. U. S., 295 U. S. 602 at 628;
F. T. C. v. Raladam Co., 283 U. S. 643 at 649;
Eastman Kodak Co. v. F. T. C., 7 F. (2) 994, affirmed 274 U. S. 619;
National Harness Mfrs. Asso. v. F. T. C., 268 F. 705 at 707;
Chamber of Commerce of Minneapolis v. F. T. C., 280 F. 45 at 48;
Marquette Cement Mfg. Co., Inc. v. F. T. C., 147 F. (2) 589 at 594.

The Doctrine of Casus Omissus is Applicable

The omission from the Clayton Act of the subpoena power of the Federal Trade Commission in administrative proceedings under that Act may have been intentional or unintentional on the part of Congress. In either event it is clearly a casus omissus. This fact and this doctrine is clearly set forth in the following cases:

". . . a casus omissus is not unusual, particularly in legislation introducing a new system."

United States v. Weitzel, 246 U. S. 533, 543 (1918).

"When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."

Hobbs v. McLean, 117 U. S. 567, 578 (1886).

"The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks it not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

Iselin v. United States, 270 U. S. 245, 250, 251 (1926).

"It is a general rule that the courts may not by construction insert words or phrases in a statute, or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law, however just and desirable it may be to supply the omitted provision.

"In this respect, it has been declared that it is not the office of the court to insert in a statute that which has

been omitted, and that what the legislature omits the courts cannot supply. These rules have been regarded as applicable to an unintentional omission. It is immaterial that the omission was a mere oversight on the part of the legislature and that without doubt the statute would have been drawn otherwise had the attention of the legislature been called to the oversight."

50 Am. Jur. Statutes Sec. 234, p. 221.

See also:

Ebert v. Poston, 266 U. S. 548, 554 (1925);
United States v. Monia, 317 U. S. 424, 430 (1943);
United States v. Great Northern Railway Co., 343 U. S. 562, 575 (1952);
Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 452 (1901).

Long Usage Cannot Grant a Power to the Commission Which the Statute does not give the Commission.

Since it is clear that the Federal Trade Commission does not have subpoena power in a Clayton Act proceeding, long usage (assuming there has been such usage) cannot serve to arrogate to the Commission power it does not otherwise lawfully possess. Unlawful long usage cannot generate subpoena power. In *Brotherhood v. Madden*, 58 F. Supp. 366, 373 (D. Md. 1944) rev'd other grounds, 147 F. 2d 439 (4th Cir. 1945), this Court in part stated:

"(S)uffice it to say that a practice on the part of the Board, no matter how uniformly and long continued, cannot be made a lawful practice unless within the scope and intent of the statute from which, and only from which, the Board derives its powers."

In *United States v. Morton Salt Co.*, 338 U. S. 632, 647 (1950) the Supreme Court in part stated:

"The fact that powers long have been exercised well may call for close scrutiny as to whether they exist;

but if granted, they are not lost by being allowed to lie dormant, *any more than non-existent powers can be prescribed by an unchallenged exercise.*" (Emphasis supplied.)

In *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 594 (7th Cir. 1945), the Seventh Circuit in part stated:

"... (administrative agencies) ... are the creatures of Congress and it is not within the province of the Courts either to emasculate or enlarge the powers which it has conferred. Any appeal for relief should be made to Congress rather than to the Courts."

As was incisively stated in *Application of Barnes*, 116 F. Supp. 464, 467:

"The importance to the administration and enforcement of the Act is evident because it would ease the burden of investigations in such situations as here, but such reason of expediency cannot prevail if the subpoena power exercised is in excess of the statutory grant ... The subpoena power must remain within the bounds of the legislative. ..."

The rationale of the Supreme Court in *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 367 (1942), speaking through Chief Justice Stone, in a case concerning the power to delegate the issuance of subpoenas, stated:

"Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him au-

thority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction."

And as was stated by the Supreme Court in *Federal Trade Commission v. Rubberoid Co.*, 343 U. S. 470, 479 (1952):

"Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress."

In the companion case of *Federal Trade Commission v. William B. Rubin, President, The Sweets Company of America, Inc., and The Sweets Company of America, Inc., a corporation*, No. M 18-304, decided August 17, 1956 by the United States District Court for the Southern District of New York, supra and involving identically the same legal question, District Judge Dimock in part stated:

"Petitioner makes a plea based on administrative interpretation. It is said that the Federal Trade Commission has issued in Clayton Act cases hundreds and perhaps thousands of subpoenas. That, without more, is insufficient to supply the omission of a grant of the subpoena power in statutory law. See United States v. Morton Salt Co., 338 U. S. 632, 647."

Judge Dimock concluded his opinion with the statement:

"I regret that I am unable to agree with two cases in which the power of the Federal Trade Commission to issue subpoenas in Clayton Act cases has been upheld, F. T. C. v. Reed, D. C. N. D. Ill. E. D., Docket 56 C. 843, June 12, 1956, and F. T. C. v. Menzies, D. C. D. Md., Docket 36, August 30, 1956."

There is no final decision of any Court sustaining the Commission's contention that it has the subpoena power in an administrative proceeding under the Clayton Act.

CONCLUSION

The decision in this case is one of great vital importance — of great importance to both the Government and the public, and it is respectfully prayed that this Court grant the petition for Writ of Certiorari, as herein prayed.

Respectfully submitted,

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